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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ALFRED WILLIAM MANSFIELD, HENRY HOLT, CHARLES FRANCIS HALEY, FREDERICK COSSITT ROGERS, TIMOTHY PATRICK BROSNAN, GEORGE HENRY ROSS, RICHARD FREDERICK TEICHGRAEBER, JOHN WHITNEY, JOHN WILEY JORDAN, JAMES ALOYSIUS KIERNAN, JAMES ARTHUR PRINDIVILLE, ANDREW MITCHELL MONTGOMERY, BENJAMIN EVANS BILLINGS, AND JOSEPH FRANCIS CROWLEY, AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THOMSON & MCKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, VAN C. KUSSROW, AS ACTING TAX ASSESSOR, AND H. EARNEST OVERSTREET, AS TAX COLLECTOR IN AND FOR SAID COUNTY,

Appellees.

STATEMENT OF BASIS ON WHICH APPELLANTS CONTEND THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE APPEALED FROM AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, Paragraph 1, Bernard Eugene Smith, Alfred William Mansfield, Henry

Holt, Charles Francis Haley, Frederick Cossitt Rogers, Timothy Patrick Brosnan, George Henry Ross, Richard Frederick Teichgraeber, John Whitney, John Wiley Jordan, James Aloysius Kiernan, James Arthur Prindiville, Andrew Mitchell Montgomery, Benjamin Evans Billings, and Joseph Francis Crowley, as co-partners, trading and doing business under the firm name and style of Thomson & McKinnon, the above appellants, file this, their statement particularly disclosing the basis on which said appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the decree appealed from herein as follows:

I.

The statute believed to sustain appellate jurisdiction is Section 344A of Title 28 of the United States Code which provides that

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

II.

Chapter 15789, Laws of Florida, 1931, Volume 1, at pages 1406 to 1412, as approved July 29th, 1931, is a general tax law applicable to intangible personal property. This chapter as re-enacted by Chapter 20724, Laws of Florida, 1941, presently appears in the official Florida Statutes of 1941 as Chapter 199. The pertinent provisions of Chapter 15789 are as follows:

> Section 3 divides intangible personal property into three classes

(1) Class A being stocks, bonds, except exempt governmentals,

(2) Class B, notes, mortgages and liens upon Florida property, and

(3) "Class C intangible personal property shall include all other personal property not embraced in Class A and B intangible property: provided that intangible personal property belonging to the State of Florida or any political subdivision thereof and/or any religious, charitable, benevolent or educational association shall be exempted from taxation: provided, however, that nothing herein contained shall pertain to franchise."

and

Section 12 (B)

"There is hereby annually levied and assessed on all Class C intangible personal property to be apportioned to the State for state purposes a tax of one-tenth of one mill on the dollar of the taxable value of such Class C intangible personal property, to be assessed and collected as other taxes are assessed and collected for state purposes and to be paid into the general revenue fund of the State of Florida." (Under the 1941 Act this levy is ten times higher; i. e., one mill per dollar)

and

Florida's fundamental tax laws provide in Section 893 of the Compiled General Laws of Florida, 1927, now Section 192.01, Florida Statutes of 1941,

"*Subjects of Taxation.* All real and personal property in this state and all personal property belonging to persons residing in this state, not hereby expressly exempted therefrom, shall be subject to taxation in the manner provided by law."

and

In Section 896, Compiled General Laws, 1927, substantially Section 192.03, Florida Statutes, 1941

> "*Personal property defined.* The terms 'personal property' and 'personal estate' as used in this chapter have the same meaning and shall for the purpose of taxation be construed to include all goods and chattels, monies and effects, all boats and vessels, all deeds due or to become due from solvent debtors whether on account, contract, note or otherwise, all public stocks or shares in all incorporated or unincorporated companies."

III.

The decree appealed from was entered on the 20th day of July, 1943, as appears from page 244 of the printed record.

IV.

The application for appeal was presented on the 11th day of October, 1943, as appears from page 209 of the printed record.

V.

The Appeal herein is from a decree of the Supreme Court of the State of Florida affirming the dismissal of appellants' civil suit in equity brought to enjoin the appellees from assessing and attempting to collect an intangible personal property tax upon certain of appellants intangible personal property situate beyond the jurisdiction of the State of Florida.

The appellants, a co-partnership, constitute a stock brokerage firm domiciled in New York City, New York, where the principal office of the firm is located. The firm is engaged in the business of commission brokers for the purchase and sale of securities, executing ninety-nine per-cent of its transactions on the New York Stock Exchange.

This business is carried on in the firm's New York office, except certain services which are purely ministerial, ancillary to the functions of the main office, require the exercise of no discretion, and are performed by branch offices, several of which are located in the State of Florida.

The branch offices take orders from customers for the purchase or sale of securities, which orders are transmitted to the home office in New York City. Said branch offices provide reports on market conditions and quotations by means of a so-called board room where the firm's customers can watch the reflected activitiy of the various securities exchanges, furnish private wire facilities, and perform various other ministerial services. All orders taken by branch offices are subject to approval in New York of a resident New York partner. All exchanges on which the firm trades are located outside of the State of Florida.

Where an approved customer wishes to purchase stock on margin, the appellant firm advances for the account of such customer in New York a portion of the purchase price of the stock. This advance is made in New York at the time the stock is paid for by the appellants, which under the rules of the Stock Exchange, must be within the second business day after the purchase on the Stock Exchange. When a marginal purchase has thus been completed and the appellant firm has advanced a portion of the purchase price of stock, there is created and entered in the books and records of the firm, maintained in its principal office in the State of New York, an account receivable, known in the trade as a marginal customer's "debit balance", which is not evidenced by any specific promise to pay, either written or oral.

This debit balance or account receivable is always secured by the retention of the stock against which the advance was made by the firm. This stock, although belonging to the customer, is never delivered to him so long as there remains unpaid any portion of the said debit

balance or account receivable. Said stock is at all times held within the State of New York by the appellants or by them in turn pledged with a bank in New York to secure a replenishment of that part of the firm's New York capital which was loaned upon the stock.

The appellants filed a bill in equity to enjoin the appellees from levying and attempting to collect an intangible personal property tax upon such marginal customer's debit balances, alleging the modus operandi of appellants' business in detail, and that the imposition of an ad valorem tax upon the said debit balances by the State of Florida would violate the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

An appeal to the Supreme Court of the State of Florida from a decree dismissing the said bill, resulted in an opinion unanimously holding the bill to contain equity, its allegations to be legally sufficient, and that under said allegations the attempted imposition of the tax would be contrary to the Fourteenth Amendment to the Constitution of the United States, as appears from Exhibit 1 hereto attached. The cause was remanded for further proceedings in accordance with said opinion, and in due course the appellees filed an answer.

Testimony was taken before a Master where the only evidence was that introduced by the appellants. The exhibits and testimony, both on direct and cross-examination, unquestionably sustain every material allegation of ultimate fact as to the method of carrying on the firm's business (Tr. 49-104; App. A), and disclose the identical method of business operation upon which the Supreme Court of Florida predicated its first opinion herein. The trial court again dismissed the bill. Upon a second appeal to the Supreme Court of Florida, the action of the trial court was affirmed, as will appear from Exhibit 2 hereto attached.

The federal questions sought to be reviewed were first raised in Paragraph 8 of the bill of complaint filed in the trial court, in the following language:

> "8. Plaintiffs are further informed and believe and thereupon allege that imposition of such tax is attempted, notwithstanding the conceded fact of foreign ownership of said debit balances, on a presumption that said debit balances are property within the State of Florida. Plaintiffs charge the contrary, and allege that such property is not within the jurisdiction of this State, and that if said statute is interpreted and applied to provide for or authorize taxation of such debit balances, it results in laying a tax on property wholly beyond the jurisdiction of the State, and consequently offends the 14th Amendment of the Federal Constitution and Section 12 of the Declaration of Rights of the Constitution of Florida by depriving the Plaintiffs of property without due process of law, and further violates such provision of the Federal Constitution by denying to Plaintiffs within the State of Florida the equal protection of the laws, and also violates the Commerce Clause of the Federal Constitution (Art. I, Sec. 8, Cl. 3) by imposing a direct burden upon interstate commerce."

And also in the Supreme Court of Florida upon the first appeal, as appears from its first opinion hereto attached, marked Exhibit 1, as follows:

> "It is asserted that the imposition of this tax, because the property is not within the jurisdiction of the state, would violate the 14th Amendment of the Federal Constitution and Section 12 of the Declaration of Rights of the Constitution of Florida by depriving the plaintiffs of property without due process of law. Jurisdiction of the state is challenged on the ground that the domicile of the owner of the debit balances is in New York and therefore no situs exists for taxation in Florida."

The above alleged unconstitutional administration of a general tax law formed the basis of the action, formed the sole ground upon which relief was sought and was necessarily involved in every stage of the proceedings and the determination thereof, including the final determination upon the second appeal.

The above federal questions were first passed upon by the trial court in dismissing the bill of complaint for want of equity (Tr. 16-17); secondly, were passed upon by the Supreme Court of the State of Florida on the first appeal had herein, as appears from a copy of the opinion of said court hereto attached, marked Exhibit 1; and thirdly, were passed upon in the last opinion of said court hereto attached, marked Exhibit 2, by denying the asserted federal rights on a non-federal ground without evidence to support it.

In support of the above assertion that the rulings of the Supreme Court of Florida were of such a nature as to entitle an appeal to the Supreme Court of the United States, the second opinion of the Florida Supreme Court (Exhibit 2 hereof) shows

(1) That the court's erroneous conclusion of a Florida business situs for the intangibles in question was based on uncontroverted facts established in the record rather than upon want of proof of any particular facts;

(2) That the court purportedly adheres to its first opinion upholding its earlier decision on the strict requirements for business situs of intangibles for its residents, but now relaxes the rules where foreign-owned and held intangibles are involved.

Thereby the court sanctioned an administration of the Florida tax law in violation of the due process clause of,

and denied equal protection of the law contrary to, the Fourteenth Amendment to the Constitution of the United States.

VI.

The grounds upon which it is contended the questions involved are substantial are

(a) This case is one of first impression in that it has never before been held by this or any other court that a state can lawfully tax intangibles neither held, owned nor possessing a business situs within its jurisdiction.

(b) The federal questions raised are of national importance because the decision appealed from, if adopted by the courts of other states, will place an unjust and unwarranted burden upon the financial business of the country, not only as to the appellants and others similarly engaged in said business, but also as to the general investing public.

(c) Although the Supreme Court of Florida upon the second appeal held as a result of a finding wholly without evidence to support it that the tax complained of may be lawfully imposed, nevertheless upon the first appeal the said court in an unanimous opinion held upon the same facts that the imposition of the tax complained of would violate the provisions of the Constitution of the United States.

VII.

Unless otherwise noted herein all record references are to be printed transcript as prepared and filed in the Supreme Court of the State of Florida upon the second appeal.

VIII.

The cases believed to sustain the jurisdiction are as follows:

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194.

Safe Deposit and Trust Co. v. *Virginia*, 280 U. S. 83; *Curry* v. *McCanless*, 307 U. S. 357.

Myles Salt Co. v. *Board of Commissioners of Iberia and St. Mary's Drainage District*, 239 U. S. 478.

Fisk v. *Kansas*, 274 U. S. 380.

Aetna Life Insurance Co. v. *Dunken*, 266 U. S. 389.

Eureka Pipe Line Co. v. *Hallaman*, 257 U. S. 265.

United Fuel Gas Company v. *Hallaman*, 257 U. S. 277.

United Gas Public Service Co. v. *Texas*, 303 U. S. 123.

Great Northern Railroad Co. v. *Washington*, 300 U. S. 154.

Carpenter v. *Shaw*, 280 U. S. 363.

Beidler v. *South Carolina Tax Commission*, 282 U. S. 1.

Baldwin v. *Missouri*, 281 U. S. 586.

Johnson Oil Refining Company v. *Oklahoma, ex rel. Mitchell*, 290 U. S. 158.

Norris v. *Alabama*, 294 U. S. 587.

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737.

Broad River Power Company v. *South Carolina, ex rel. Daniel*, 281 U. S. 537.

Creswill v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246.

Enterprise Irrigation District v. *Farmers Mutual Canal Company*, 243 U. S. 157.

Chicago, Burlington and Quincy Railway v. *People of Illinois, ex rel. Grimwood*, 200 U. S. 561.

West Chicago Street Railroad Co. v. *Illinois, ex rel. Chicago*, 201 U. S. 506.

Lawrence, et al. v. *State Tax Commission of Mississippi*, 286 U. S. 276.

Dated this 11th day of October, A. D. 1943.

Respectfully submitted,

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EXHIBIT "1".

IN THE SUPREME COURT OF FLORIDA JANUARY TERM A. D. 1942 EN BANC.

BERNARD EUGENE SMITH, et al., as co-partners, trading and doing business under the firm name and style of Thomson & Mckinnon, *Appellants,*

vs.

J. N. LUMMUS, JR., as Tax Assessor of Dade County, Florida, and HAYES WOOD, as Tax Collector in and for said County, *Appellees.*

Dade County

Opinion filed March 6, 1942,
Rehearing denied March 24, 1942.
An Appeal from the Circuit Court for Dade County, Ross Williams, Judge,

Rinehart & Carroll, George H. Salley, Hall, Cunningham & Haywood (New York City) for Appellants,
J. Tom Watson, Attorney General, Lawrence A. Truett, Assistant Attorney General, Ward & Ward, Joseph Weintraub, for Appellees.

THOMAS, J.:

A bill of complaint was filed by various persons, copartners doing business as Thomson & McKinnon, against the tax assessor and tax collector of Dade County, Florida, seeking an injunction against them to prevent their assessing and collecting taxes on certain intangible personal property of the plaintiffs described as accounts receivable from customers or debit balances growing out of transactions which we will describe in our analysis of the bill of complaint.

The facts which we will give are those offered to be proved by the plaintiffs in support of their prayer for relief. The copartnership is domiciled in New York where it conducts its business "as commission broker for purchase and

sale of securities * * * on the New York Stock Exchange" and other exchanges located there and elsewhere. Its agents solicit business in other states, including Florida where it maintains offices in many cities, one of which is Miami.

The so-called agencies serve the firm by giving market quotations and other information to prospective customers, by furnishing them facilities incident to the business of the copartnership, by accepting and sending to the main office at New York orders from clients for the purchase and sale of stocks and commodities.

The tax assessor has demanded that a return be made of intangible personal property subject to taxation under Classification C, Section 3 of Chapter 15789, Laws of Florida, Acts of 1931, Ex. Sess., specifically described as "all amounts appearing on the firm's records as indebtedness from customers dealing with the firm through its Florida agents."

It is asserted that the imposition of this tax, because the property is not within the jurisdiction of the state, would violate the 14th Amendment of the Federal Constitution and Section 12 of the Declaration of Rights of the Constitution of Florida by depriving the plaintiffs of property without due process of law. Jurisdiction of the state is challenged on the ground that the domicile of the owner of the debit balances is in New York and therefore no situs exists for taxation in Florida.

The debit balances have no reference to transfers of property of any kind "brought into the State or held or owned in the State" and "no merchandise or stock in trade" is sold here. These debit balances arise from transactions for sales and purchases elsewhere by plaintiffs for the account of customers whom the copartnership serves as broker "on a 'marginal' basis" and they represent advances for the residue of the market price when but a part of it is paid by the customers. These loans are made only in another state and never in the State of Florida. No money or capital forming the source of such loans to customers is kept in this state. When such loans are made they are not evidenced by promissory notes or other writ-

ing and are secured by retention of the securities in New York with the right in the broker of transferring them for its protection. The stocks, on which the firm has advanced part of the purchase price and which it holds to secure the payment of the remainder due by the customer, are held in the foreign state. The debt "is created by and under the laws of the State of New York and independent of the laws of Florida." The copartnership does not resort to the laws of Florida to effect collection of debit balances and the so-called agencies are not authorized to collect accounts. There is no competition with any business in Florida and the debit balances are not the result of any loans made by any representative here.

Whenever a customer wishes to pay to the firm any money in "reduction or discharge of a debit balance, or for margin or additional margin," he may deliver the money to the Florida agent who gives him in exchange a temporary receipt but the agent has no authority or control over the money received except to send it intact to New York or to place it in a bank account from which it may be withdrawn only by the principal office. Upon notice from the agent the customer's account in New York is then credited immediately with the amount of the payment.

None of the moneys received by the agents may be applied by them to the expenses of the agency, funds for that purpose being supplied out of the firm's general capital and held in a local bank account separate from moneys paid to the firm by customers. All records of customers' accounts are kept at the home office and it is from there that all formal notices, reports of transactions and statements are furnished. Approval and acceptance of customers is made entirely in New York and with reference to these matters agents in Florida have no authority. In the conduct of its business the copartnership complies with the rules of the New York Stock Exchange and other exchanges, requirements of the laws of the State of New York and the acts of Congress.

It was the opinion of the chancellor that the bill was without equity, so he dismissed it and the matter reaches us on an appeal from that final order.

In considering the propriety of the chancellor's action dismissing the bill of complaint we think it is well to use as an introduction to our observations the statement that we long ago recognized the general rule that personal property has its taxable situs in that state where the owner of it is domiciled, Hunt v. Turner, 54 Fla. 654, 45 So. 509, and therefore we feel that the question presented to us for determination is the one whether the circumstances outlined in the bill of complaint, as they appear from our somewhat brief analysis, bring into play any of the exceptions which from time to time have been applied to facts in particular cases. Wood v. Ford, Fla., 3 So. 2d 490.

As we understand the representation made by the plaintiffs they are engaged in the business of taking orders for the purchase and sale of stocks and where they are bought by the customer, without payment of the full price, the remainder is loaned by the firm. To secure the obligation the broker retains the stock and the relationship between the broker and customer may be terminated and the stock transferred on demand of either party. To expand this business an agency was set up in Miami and the representatives there perform certain services in furtherance of the firm's business. Our study of the bill, however, leads us to the inescapable conclusion that in doing so they exercise no discretion whatever and perform purely ministerial duties. Thus, these agents may receive an order for the purchase or sale of stock and accept payments of money from customers but they have no power to pass on the credit standing of any one who applies to buy stock on margin nor do aught with the money they receive than deposit it in a Florida bank to the firm's account in New York City and it is only by the firm that it can be withdrawn.

According to the bill an entirely separate account is kept for the purpose of paying salaries and operating expenses, and so as far as we can see the agency in the State of Florida is not self-operating and does not constitute an independent business. The plaintiffs have paid all ad valorem taxes assessed and levied against them in Florida and have also "paid all excise or occupational taxes which have been im-

posed by the State and the counties and municipalities in which its agents have acted. In addition thereto, the Plaintiff firm has duly made returns and paid, in the various counties in which it has been so assessed, intangible personal property tax on the cash in bank held by its agents as of the first of each year in which so required, being the money of the firm held by the respective agents for the operation of the agency or temporarily in the agent's hands for remittance to the New York firm. None of such taxes are now due or unpaid."

Scrutiny of the plan of operation of the agencies in Florida clearly indicates that the property in question does not fall within the exception described in Hunt v. Turner, supra.

Taxes are the contributions from persons and property levied by the state for the support of the government. Therefore, whether they derive from tangibles or intangibles the use of them is the same and as they are enforced by the state in its sovereign capacity persons and property not within its territorial limits cannot be subjected to its levy. Cooley on Taxation, 4th Ed., Section 1, Chapter 1. By the same authority it is stated that this power of the state to tax does not "as a general rule extend to the intangible personal property of a nonresident, for such property must ordinarily be regarded as having its situs at the domicile of its owner." Cooley on Taxation, 3d Ed., page 89.

The purpose of taxation being collection of money by the sovereign to meet the public needs and the cost of the maintenance of government itself it seems fundamental that there should be a corresponding privilege and protection for which taxation is imposed, therefore, if one domiciled in one state is maintaining a business in another and receiving all the advantages that the government of the latter and its various branches afford in the protection and the maintenance of the business a resulting obligation arises on the part of the taxpayer to pay his proportionate share in taxes to the public exchequer.

It seems to us from our study of the authorities that the exception to the rule that the tax on intangible personal property should be levied at the domicile of the owners

arises in those cases where, because of activity in another state involving the property, they receive such benefits and protection under the laws of that state that they should make a contribution to its government.

It is conceivable that one in a business like that conducted by the plaintiffs could establish an office in a state other than the domicile, provide a fund there to be used by representatives in the purchase of stock and in financing customers with authority on the part of the representatives to draw upon their business judgment and discretion in the operation of the business and thereupon become liable to taxation upon the property of the enterprise.

That, however, is not the situation with which we are dealing. It cannot be deducted that the plaintiffs are escaping the contribution they should make to the government of the State of Florida in order for them to conduct their business here. It is alleged in the bill of complaint, and admitted for the purpose of the motion to dismiss, that they pay taxes on all other property held by them within the borders of the state assessed upon an ad valorem basis in addition to excise and occupational levies. They complain solely because of the proposed assessment and levy on the so-called debit balances or accounts receivable. They resist taxation of these items because, so far as the local agency is concerned, the activity is a strictly representative one, wholly dependent upon the principal office. The transactions in Florida are, so it is urged, ancillary to the business operated at the domicile of the owner in New York. In the general business affairs of the plaintiff there are many features calling for the exercise of judgment and discretion. All of those features are absent from deals made in Florida. We iterate when we call attention of the reader to the averments that the representatives of the firm in this state exercise none of such judgment or discretion but simply perform the clerical services incident to the business.

When we contrast the field of activity in Florida with that in New York, it is apparent that the former is by no means as extensive as the latter and we think the restricted operation here refutes the argument that there is a business situs

so distinct that taxation on intangibles is justified. This position is in harmony with the authority which we have already cited, Cooley on Taxation, 4th Ed., Volume 2, page 1037, where it is said that no situs exists "where the agent in the state is a mere custodian or clerk or order taker."

When the relative activity of the principal office and the agency is borne in mind we are convinced that by paying the taxes which we have detailed in quoting from the bill the plaintiffs make their full contribution to the protection which the government of this state affords in the maintenance of an agency which cannot be called independent of the principal office.

Our conclusion harmonizes with the view of the supreme court of the United States in Curry v. McCanless, 307 U. S. 357, at page 368, 59 S. Ct. 900, at page 906, 83 L. Ed. 1339, 123 A. L. R. 162, where it was stated: "The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business." This decision was referred to in Wood v. Ford, supra.

If we are to follow the rule which we stated at the outset, with reference to taxation at the situs, the State officials would go beyond the sphere of their authority if they assessed and collected taxes on the debit balances when all save certain mechanical activities with reference to them are, according to the allegations of the bill of complaint, controlled entirely from another state. We cannot find in the bill of complaint alleged facts which would warrant a construction placing the intangibles within the exception to the rule.

We emphasize that appellants allege they pay without complaint all ad valorem and excise taxes and likewise all taxes on intangibles that have a taxable situs in this state. The effect of what we have written is only to relieve them from the burden on intangibles the situs of which is fixed in the foreign state.

We therefore reverse the decree with instructions to the chancellor to proceed in accordance with the views we have given.

BROWN, C. J., and WHITFIELD, TERRELL, BUFORD, CHAPMAN, and ADAMS, JJ., concur.

EXHIBIT "2".

IN THE SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1943, EN BANC.

BERNARD EUGENE SMITH, et al., as Co-partners, Trading and Doing Business under the Firm Name and Style of Thomson & McKinnon, *Appellants*,

vs.

J. N. LUMMUS, JR., as Tax Assessor of Dade County, Florida, and HAYES WOOD, as Tax Collector in and for Said County, *Appellees*.

Dade County.

Opinion filed July 20, 1943.

An appeal from the Circuit Court for Dade County, Ross Williams, Judge.

Rinehart & Carroll, George H. Salley, Hall, Cunningham & Haywood (New York City) for Appellants.

J. Tom Watson, Attorney General; Lawrence A. Truett, Assistant Attorney General; Ward & Ward, Joseph Weintraub, for Appellees.

CHAPMAN, J.:

This suit comes here for the second time. It originated in the Circuit Court of Dade County, Florida, and sought a restraining order against the assessment and collection of a tax on described intangible personal property owned by Thomson & McKinnon, a partnership, and the situs of the intangibles is alleged to be in New York and not Dade County, Florida. The prayer of the bill was designed to ultimately restrain Tax Assessor Lummus and Tax Collector Wood, each of Dade County, Florida, from the collection of an intangible tax on the described personal property. The Chancellor sustained a motion to dismiss, for want of equity, and on appeal here the said order was reversed. See Smith vs. Lummus, 149 Fla. 660, 6 So. (2d) 625.

On the return of the mandate, an answer by the defendants was filed, which denied the material allegations of the bill of complaint. The cause was by the Chancellor referred to the Honorable W. D. Bell, as Special Master, with directions to take testimony and make findings on both law and facts and recommendations as to a decree. The record discloses that the plaintiffs adduced but a single witness, James A. Kiernan, coupled with a number of exhibits appearing in the transcript and identified as Exhibits 1, 2, 3, 4, 5 and 6. The defendants did not offer any testimony before the Special Master and counsel for appellee contend that the evidence adduced by the plaintiffs failed to establish the material allegations of paragraph 9 and subsections thereof identified in the bill of complaint as (1) to (X), inclusive.

The report to the Chancellor as made by the Special Master was excepted to, and on hearing by the Chancellor an order was entered ratifying and confirming the report and recommendations of the Special Master, and by appropriate order dismissed the bill of complaint, and an appeal therefrom has been perfected by the plaintiffs below to this Court, being the second appeal in this cause.

Counsel for appellants contend that the law of the case was settled or established in the former appeal in which we held that the allegations of the bill were sufficient for equitable relief as against a motion to dismiss made by the defendants below for want of equity. That the testimony of the witness Kiernan, coupled with the Exhibits 1, 2, 3, 4, 5, and 6 adduced by the plaintiffs fully sustain the allegations of the bill, when it becomes the lawful duty of the Chancellor not to dismiss the cause but to enter a decree for the plaintiffs in accordance with the prayer of the bill. That the recommendations to the Chancellor by the Special Master as to the form of the decree to be entered were clearly erroneous and the exceptions thereto filed by the plaintiffs should have been sustained.

Counsel for appellees agree that the law of the case was settled by this Court on the former appeal, but contend that the law is inapplicable to the facts proven by the plaintiff. That a variance now exists between the probata and

allegata in that paragraph 9 of the bill of complaint which alleges that the assessments are void and the taxes imposed illegal because the domiciliary ownership of the debit balances is in New York; and (2) the debit balances do not have a situs for taxation in the State of Florida. That the evidence adduced by the plaintiffs failed to establish these material issues and the decree of dismissal was the only one the Chancellor could have entered.

Mr. Kiernan testified that he was a member of the partnership of Thomson & McKinnon and resided in New York City, and supervised or approved customers' accounts of the firm. The firm is a member of the New York Stock Exchange and acted as brokers in securities and commodities on a commission basis. The firm transacted business on the stock exchanges in New York, Chicago, Toronto, and possibly Indianapolis. The firm has maintained an office in Miami, Florida, for several years and in other Florida cities during the Winter seasons.

The Miami office was under the managmeent of Mr. Griffin and it had approximately twelve employees. The employees consisted of an (a) order clerk; (b) telephone operator; (c) two board markers; and (d) customers' men employed to contact customers in placing orders. The Miami branch provided services for its customers viz: (1) a board room where customers could visit and observe the market; (2) price quotations appeared on the board in the customers' room; (3) the morning newspaper was supplied; (4) advice was supplied to customers on demand; (5) trade journals and information in abbreviated form were supplied; (6) the customers' men were highly trained and well educated about stock transactions; (7) the statistical department service maintained at the New York office was not supplied but could be supplied on demand; (8) customers' men are paid on a commission basis.

Mr. Griffin, manager of the Miami Branch, paid rentals and operation costs by checks drawn on a Miami bank identified as the "Manager's Account", and these funds are supplied from the New York office. The firm of Thomson & McKinnon opened an account with a Miami bank for a specified amount, which is referred to as the "Customers'

Account", and deposits are sent there from the New York office. The manager of the Miami branch is authorized to make payment to customers of the Miami branch from the "Customers' Account" drawn on a Miami bank in a sum of not to exceed $5,000.00. Money had been transferred from the "Manager's Account" to the "Customers' Account" and customers paid therefrom by the manager. Orders from the Miami branch are transmitted to the New York office by private wires and Mr. Kiernan approves or disapproves the orders. The books are kept in the New York office of transactions originating in the Miami branch and only memoranda made and preserved at the branch office. The Miami branch paid the City of Miami $550.00 occupational tax and paid taxes to the State of Florida in 1939 in the sum of $2,625.97, and $2,673.52 in 1940.

The procedure observed in the purchase of 100 shares of Chrysler stock on the stock exchange through Thomson & McKinnon, brokers, for instance, is about as follows: the purchaser appears in the Miami branch or calls it over the telephone, when a confidential report of the prospective customer is obtained, being Plaintiffs' Exhibit #2. The application is sent by the Miami branch office to the New York office, and is approved or disapproved by Mr. Kiernan. If the account is accepted the customer is requested to sign a "Customers' Agreement", being plaintiffs' Exhibit #4. If the customer purchases the stock on margin, he pays e. g. 40% cash to the manager of the Miami branch and the same is by him transmitted to the New York office and the stock purchased by Thomson & McKinnon. The broker advances 60% of the purchase price of the 100 shares and retains the physical custody of the stock as security under the authorization agreement viz:

"AUTHORIZATION

Provided for by Resolution of the Governing Committee of the New York Stock Exchange Adopted February 10, 1932.

....., 1943.

Messrs. Thomson & McKinnon,
11 Wall Street,
New York City.

DEAR SIRS:

You are hereby authorized by the undersigned to loan from time to time, either to yourselves as brokers or to others, any or all stocks, bonds and other securities which you may now or hereafter hold for the account of the undersigned, either separately or together with other securities.

The authority herein granted shall remain in full force and effect until you shall receive written notice of its revocation.

Very truly yours,

(Signed) ....."

If Thomson & McKinnon pays $100,000.00 for 100 shares of Chrysler stock on the New York Exchange for the accommodation of a customer purchasing through their Miami branch, it possibly becomes a profitable transaction for the firm. Thomson & McKinnon receive a commission as brokers and interest on the "Debit balance" due by the Miami customer and payment secured by the Chrysler stock. The 100 shares of stock is the property of the Florida customer pledged by him for the payment of the money loaned. Paragraph 7 of the bill of complaint alleges that the domiciliary ownership of the "debit balance" is in New York. We are unable to find the testimony in the record to support this allegation. The customer resides in Florida; the original payment was made by him in Florida at the branch office; interest and broker commissions are paid in Florida; Florida law protects the branch office and business transactions had therein; Florida courts provide forums for adjudication of differences arising out of the transactions, and for these several reasons it cannot be said that the "debit balances" originated in New York, as alleged, to the exclusion of the State of Florida.

It is our conclusion that the appellants failed to establish by competent testimony the material allegations of the bill of complaint and we fail to find error in the order of the Chancellor dismissing the cause on final hearing. See Settles vs. Northwestern Mut. Life Ins. Co., 193 Ga. 495, 10 S. E. (2d) 396; Wisconsin vs. J. C. Penny Co., 311 U. S. 435, 61 Sup. Ct. 246, 85 L. Ed. 267, 130 A. L. R. 1229; Curry vs. McCanless, 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 55 L. Ed. 762, 31 Sup. Ct. 550.

Affirmed.

Buford, *C. J.*, Brown and Sebring, *J. J.* concur.
Terrell, Thomas and Adams, *J. J.* Dissent.

(9075)